IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JUAN CARLOS PEREZ GARCIA, et al., **Plaintiffs,** **v.** **PUERTO RICO PORTS AUTHORITY, et al.,** **Defendants.**	**CIVIL NO. 08-1448 (GAG)**

MEMORANDUM OPINION AND ORDER

On April 7, 2011, third-party defendant Kingfisher Air Services, Inc. ("Kingfisher") moved for reconsideration (Docket No. 502) of the court's opinion and order (Docket No. 496) granting in part and denying in part Kingfisher's motion for summary judgment (Docket No. 441). Kingfisher moved for reconsideration on two grounds: (1) no admissible evidence was presented to support defendant Carribean Airport Facilities' ("CAF") contention that the vertical reciprocating conveyor ("VRC") was considered a common area under the lease; and (2) the Mutual Indemnification Clause between Kingfisher and CAF is not applicable to the facts of the case. After considering Kingfisher's arguments, the court **DENIES** its motion for reconsideration (Docket No. 502).

In its previous opinion and order, the court found that CAF had presented sufficient evidence to create a triable issue of fact as to the status of the VRC as a common area under the lease. (See Docket No. 496 at 12.) The court previously cited the affidavit of CAF owner Anthony Tirri and the deposition testimony of Kingfisher employee Michael Jackson, as sufficient evidence to deny summary judgment. Kingfisher now contends that the affidavit of Anthony Tirri cannot be considered by this court as it represents a "sham affidavit," which directly contradicts Tirri's previous deposition testimony. The court disagrees with Kingfisher's interpretation of Anthony Tirri's statements in his deposition. The section of Tirri's deposition, cited by Kingfisher as contradictory, states:

Q: Does this agreement include storage agreement, a storage facility or space

in the warehouse?

A: No, it does not appear to.

(See Docket No. 442-2 at 5, l. 8-11.) Contrary to Kingfisher's assertion, this response does not directly contradict the statement in Tirri's affidavit, which states that "[t]he incident that is the subject of the underlying action involved the VRC, which was within CAF1 and was one of the common areas of the building." (See Docket No. 431-6 at 44, ¶ 9.) See Marquez v. Drugs Unlimited, Inc., 2010 WL 1133808 (D.P.R. Mar. 22, 2010) (citing Hernandez-Loring v. Universidad Metropolitana, 233 F.3d 49, 54 (1st Cir. 2000)) (for a court to disregard statements attested to by a party in a sworn affidavit, the statements must be unambiguously contradictory to previous deposition testimony). Anthony Tirri's sworn statement does not unambiguously contradict his assertion that CAF's agreement did not include storage space in the warehouse. Instead, the statement speaks to the status of the VRC as a common area in the building. Therefore the "sham affidavit" doctrine is inapplicable to these statements.

Furthermore, the court considers Michael Jackson's statement that the VRC was used "a lot" sufficient to demonstrate that Michael Jackson, an employee of Kingfisher, believed that Kingfisher had access to the VRC and the surrounding premises; permitting the inference that the VRC was located in a common area. The court considers this submitted evidence sufficient to create a genuine issue of material fact as to the status of the VRC at the time of Plaintiff's accident.

As to Kingfisher's second ground for its motion, the court disagrees with Kingfisher's interpretation of the Mutual Indemnification Clause. The portion of the clause at issue reads, "any injury to or death of persons and/or any damage to or destruction of property on or about the Premesis and *attributable to the negligence or misconduct* of the Lessee or Lessor respectively. . . ." (See Docket No. 80-17 at ¶ 7) (emphasis added). In its motion, Kingfisher asserts that the language "attributable to the negligence or misconduct" necessarily entails that the Mutual Indemnification Clause only applies when *either* the Lessee or the Lessor is *wholly* responsible for the resulting damages. The court finds that this result is not mandated by the language of the clause.

The phrase "attributable to" does not necessarily preclude the application of the Mutual Indemnification Clause when *both* the Lessor and Lessee are legally responsible for the resulting damages. In support of its interpretation, Kingfisher cites Luis Hernandez Rosado v. Popular Leasing and Rental, 2004 PR App. LEXIS 668, however, this Puerto Rico Court of Appeals case cannot be considered by this court, as no English translation has been submitted. See Puerto Ricans for Puerto Rico v. Dalmau, 544 F.3d 58, 67 (1st Cir. 2008). Therefore, the court finds that the Mutual Indemnification Clause is applicable if it is determined that both CAF and Kingfisher are legally responsible for Plaintiff's injuries.

For the foregoing reasons the court **DENIES** Kingfisher's motion for reconsideration (Docket No. 502).

SO ORDERED.

In San Juan, Puerto Rico this 11th day of April, 2011.

s/ Gustavo A. Gelpí

GUSTAVO A. GELPI
United States District Judge